UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

In re:	
RAYMOND T. HYER, JR., GARDNER INDUSTRIES, INC., et al.	Case Nos. 92-20777, 92-20779 - 92-20791
Debtors,	
UNITED STATES OF AMERICA	
Plaintiff,	Adv. No. 02-2067-BKC-RBR-A
vs.	
RAYMOND T. HYER, JR., GARDNER ASPHALT CORPORATION, and EMULSION PRODUCTS COMPANY,	
Defendants.	

PLAINTIFF'S REPLY TO RESPONSE OF CORPORATE DEFENDANTS TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

The United States seeks – in pertinent part – a declaratory judgment that its claims, under Section 107(a)(3) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(3), against Gardner Asphalt Corporation ("GAC"), Raymond T. Hyer, Jr. ("Hyer") and Emulsion Products Company ("Emulsion") arose in late 1996 when EPA became aware that it likely would have to conduct a substantial CERCLA response action at the Drum Burial Area of the Krewatch Farm Site in Seaford, Delaware, and could link the Defendants to hazardous substances which had been released there. The claims of the United States against GAC,

Hyer, and Emulsion are based upon their arrangements for disposal of hazardous substances at the Drum Burial Area in 1981. GAC, Hyer and Emulsion allege that Plaintiff's CERCLA claims arose during 1985-1988 when the U.S. Environmental Protection Agency ("EPA") first discovered the Drum Burial Area and determined that there had been inconsequential releases of hazardous substances from a few of the drums.

On June 20, 2002, the United States filed a Motion for Partial Summary Judgment against the three debtor/defendants. The United States attached numerous affidavits and declarations (submitted under penalty of perjury) to its Memorandum in Support of Motion for Partial Summary Judgment. The declarants refer to additional documents attached to the summary judgment memorandum. The declarants authenticate each document and demonstrate that each document is excepted from the hearsay rule as a business record or report of a governmental agency, as described in Fed. R. Evid. 803(6) and 803(8).

GAC and Emulsion have opposed the granting of summary judgment against them in their joint Response of Corporate Defendants to Plaintiff's Motion for Partial Summary Judgment ("Response"), filed tardily on August 9, 2002. The Corporate Defendants have not filed any affidavits or other exhibits along with their Response. Instead, the Corporate Defendants rely upon arguments set forth in the Response and upon a Motion . . . to Strike Certain Exhibits to Plaintiff's Motion for Partial Summary Judgment ("Motion to Strike") filed with their Response. Additionally, as is shown below, the Corporate Defendants make numerous substantial mistakes of fact and law in the portion of the Response which addresses the issue of when Plaintiff's CERCLA claims arose, specifically in Paragraph numbers 24, 27-28, 30 and 32. Finally, the Corporate Defendants assert that Emulsion is

released from pre-petition claims preceding the effective date of the Second Amended Joint Plan of Reorganization as Modified ("Plan"). This assertion is based on a misconstruction of terms of the Plan and the Confirmation Order.

The United States will file its opposition to the Motion to Strike when required under this Court's Local Rules. The United States files this Reply to the Corporate Defendants' Response in anticipation that the Motion to Strike will be denied. If the Court denies the Motion to Strike, then the issues between the United States and the Corporate Defendants which are addressed in the United States' Motion for Partial Summary Judgment will be ripe for the Court's decision.

II. THE CORPORATE DEFENDANTS FAIL TO RAISE ANY GENUINE ISSUE OF MATERIAL FACT; THUS, PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT.

In their opposition to the United States' Motion for Partial Summary Judgment, the Corporate Defendants raise no genuine issues of material fact. Thus, they fail to show that Plaintiff is not entitled to judgment as a matter of law. Rather, the Corporate Defendants seek to evade judgment through arguments of counsel and by asserting groundless objections to Plaintiff's evidence. These attempted evasions are insufficient to avoid summary judgment.

Courts have consistently recognized the duty of a party opposing summary judgment to come forward with specific and genuine issues of fact. The Corporate Defendants offer no evidence of contradictory facts. They cannot create a genuine issue of fact through arguments or statements of counsel that are unsupported by the record. *See Beyah v. Coughlin*, 789 F.2d 986, 989-90 (2d Cir.1986); accord *Estate of Detwiler v. Offenbacher*, 728 F. Supp. 103, 135 (S.D. N.Y. 1989) (granting summary judgment when the non-moving plaintiffs failed "to support many of their allegations

with evidence from the record . . . ."). Having failed to raise a genuine issue of material fact, the Corporate Defendants cannot defeat Plaintiff's summary judgment motion.

Plaintiff will timely respond, in full, to the Motion to Strike. To summarize, the Corporate Defendants have alleged in the Motion to Strike that the Court cannot consider many of the exhibits supporting Plaintiff's summary judgment motion because persons who prepared Declarations attached to the Memorandum in Support of [the] Motion for Partial Summary Judgment ("Plaintiff's Summary Judgment Brief") do not have requisite personal knowledge to demonstrate the authenticity and admissibility of the exhibits. Plaintiff is confident that, to the extent the contested exhibits are not self-authenticating under Fed. R. Evid. 902, its declarants have proved that the documents meet the easily attainable standards for authenticity contained in Fed. R. Evid. 901. Moreover, the declarants have proved that the documents are admissible as business and government records, under Fed. R. Evid. 803(6) and 803(8), respectively. Thus, the Court will be free to consider the evidence contained in the exhibits to Plaintiff's Summary Judgment Brief. The exhibits will be uncontested and will support entry of summary judgment in Plaintiff's favor.

III. REPLY TO CORPORATE DEFENDANTS' ALLEGATIONS REGARDING ISSUE OF WHEN CLAIMS AROSE.

A. Paragraph 24, *Response*

In support of their argument that the United States' claim against them arose prior to the effective date of GAC's reorganization plan, the Corporate Defendants assert that "CERCLA *applies* whenever there is a release or a substantial threat of a release of a hazardous substance into the environment." *Response*, ¶ 24 (emphasis supplied). In doing so, Corporate Defendants blur the line

between EPA's response authority under Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), and the United States' recovery of costs under Section 107 of CERCLA, 42 U.S.C. § 9607. It follows, from the Corporate Defendants' assertion, that CERCLA would "apply" no matter how minor the release – for example, whenever a drop of fingernail polish (containing acetone) is splashed on the ground or someone splashes a molecule of pesticide by accident in his garden. The Corporate Defendants fail to note that the President must act "consistently with the National Contingency Plan," in responding to any release or substantial threat of release of a hazardous substance, and that the President must give primary attention to those releases which he or she deems "may present a public health threat." Section 104(a), CERCLA, 42 U.S.C. § 9604(a).[1/]

Plaintiff assumes that the Corporate Defendants are attempting to argue that a CERCLA claim arises, in the bankruptcy context, at the moment a release or substantial threat of a release of a hazardous substance occurs for which the debtor bears responsibility under CERCLA.[2/] Although the timing of a release of a hazardous substance is one fact to consider when determining the point at which a claim under CERCLA arises, for bankruptcy purposes, the majority view is that only those future

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[1/] Defendants also fail to note that the inclusion of "abandonment or discarding of barrels . . . containing any hazardous substance" within the definition of "release" resulted from the 1986 amendments to CERCLA. Thus, the fact that EPA discovered barrels in 1985 which it believed might contain hazardous substances cannot be construed as discovery of a "release" of hazardous substances; however, the United States concedes that by 1988 EPA understood that there had been some inconsequential releases of hazardous substances from some of the barrels in the Drum Burial Area.

[2/] Responsible parties under CERCLA are those: who presently own or operate a "facility" where hazardous substances have come to be located; who owned or operated the facility at the time a hazardous substance was disposed of there; who have arranged for the disposal of a hazardous substance at the facility, and those who – having selected the facility for disposal – transport the hazardous substance there. *See* Section 107(a)(1)-(4) of CERLCA, 42 U.S.C. § 9607(a)(1)-(4).

response costs which can be "fairly contemplated" by the parties at the time of the bankruptcy are claims under the Bankruptcy Code. *6A Norton Bankr. L. & Prac. 2d [sec] 169.72 (attached hereto as Exhibit 1).*[3] For all of the reasons which Plaintiff has shown, EPA could not fairly contemplate until late1996 that it would have the claim in issue for response costs at the Drum Burial Area. *See Plaintiff's Summary Judgment Brief*, at 3-7, 9-34.[4]

B. Paragraph 27, *Response*.

The Corporate Defendants allege that EPA was on notice in 1985 of a "CERCLA event" and chose to ignore that event. *Response*, ¶ 27. Thus, they assert, EPA "cannot be heard to complain of that decision many years after it could have initiated a thorough investigation and clean-up." *Id.* Plaintiff does not understand what the Corporate Defendants mean when they refer to a "CERCLA event," a term used only once in a published case.[5] If the Corporate Defendants mean that EPA

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[3] The court in *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), ruled that CERCLA claims arise at the time of a release of a hazardous substance for which a debtor bears responsibility. The Second Circuit is at odds with the Seventh and Ninth Circuits. *See In re Jensen*, 995 F.2d 925, 927 (9th Cir. 1993) and *"Chicago I,"* 974 F.2d 775, 786 (7th Cir. 1992). The court in *In re National Gypsum Company*, 139 B.R. 397 (N.D. Tex. 1992), refused to follow *Chateaugay* and articulated the "fair contemplation" test, which has become the majority view as to when CERCLA claims arise in the bankruptcy context.

[4] Again, the claim for response costs that EPA could not fairly contemplate incurring at the Drum Burial Area until late 1996 is distinct from any claim EPA might have had relating to the small amount of response costs (*i.e.* investigative costs) which EPA stopped incurring in December 1988, when its toxicologist anticipated "no threat to human health or to the environment" from the site. *Plaintiff's Summary Judgment Brief*, at 18. Indeed, EPA could not have claimed the 1985-1988 costs – insignificant as they undoubtedly were – in debtors' bankruptcy because the statute of limitations for collection of those costs had run prior to the filing of debtors' bankruptcy petition. *Id.*, at n.1.

[5] The term was used in reference to a motion of the United States seeking approval of a settlement agreement. The court stated, in *In re Eagle-Picher Industries, Inc.*, 197 B.R. 260, 265 (S.D. Ohio

ignored releases of hazardous substances at the Drum Burial Area, which the Agency first suspected in 1985, the Corporate Defendants are simply incorrect. As Plaintiff has shown in its Summary Judgment Brief, EPA and the Delaware State Agency with which EPA works cooperatively – the Department of Natural Resources and Environmental Control ("DNREC") – repeatedly inspected the Drum Burial Area during 1985 and 1987. *See Plaintiff's Summary Judgment Brief*, at 11-12, 17-18. EPA's toxicologist duly determined, in December 1988, based upon sampling conducted by DNREC in 1987 and reported to EPA in 1988, that she did not anticipate any threat to human health or the environment there. *Id.*, at 18. In sum, the Drum Burial Area did not merit EPA response action at that time.

C. Paragraph 28, *Response*

The Corporate Defendants wrongly state that the United States has argued that "it had no knowledge of and could not have anticipated the seriousness of the contamination at the Drum Burial Area prior to the Corporate Debtors' bankruptcy." *Response,* ¶ 28. The United States has made no such argument. As shown above, EPA knew in 1985 of the existence of the Drum Burial Area, but had concluded in December 1988, based upon its investigations and data presented to it by DNREC, that the site did not then merit EPA response action. Rather, the United States has consistently argued that – in view of the appearance in December, 1988 that the site was "relatively benign" – it had no sensible reason to try to determine who were the parties responsible for arranging the disposal of the drums in the Drum Burial Area. To have conducted such an investigation then would have been a

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1996), that separate motions seeking approval of the same settlement agreement were different in character. One, the debtor's motion, was filed pursuant to Fed. R. Bankr. P. 9019. The other, filed by the United States, was designed "as a CERCLA event." *Id.*

waste of taxpayers' dollars. Only in late 1996 did EPA have any reason to concern itself with who might have liability under CERCLA at that site. *See, e.g., Plaintiff's Summary Judgment Brief*, at 31-34.[6]

The Corporate Defendants are likewise in error when they allege that Plaintiff's "argument" (which, as shown, they have mischaracterized) is irrelevant "if the EPA had already incurred response costs prior to that date." *Response*, ¶ 28. As stated in footnote 4 above, the statute of limitations for seeking recovery of the response costs that EPA stopped incurring in December, 1998 (which were solely investigative costs) had run prior to the date GAC, Hyer et al. filed their bankruptcy petition. EPA began incurring the response costs at issue in this case in late 1996 and had no reasonable expectation of incurring those costs until a few weeks prior to that.

D. Paragraph 30, *Response*

The Corporate Defendants base their argument in Paragraph 30 of their Response on a gross misstatement of fact. They state (with no evidentiary support) that if EPA had "obtained the name of [Emulsion], the only asphalt company within two hundred miles, *from Tony Nero while it was interviewing him*, it would have discovered the identities of Hyer and the Corporate Debtors in time to file a claim in the Bankruptcy Cases." *Response*, ¶ 30 (emphasis supplied).[7] The Corporate

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[6] Indeed, EPA never had to track down Emulsion and GAC because DNREC identified Emulsion as a potentially responsible party at the Drum Burial Area after DNREC re-tested the site in 1994 (and then notified Emulsion of its potential liability in December 1994). *Plaintiff's Summary Judgment Brief*, at 19. Nor did EPA have to search out GAC because GAC came forward on behalf of Emulsion in early 1995 and agreed to clean up the Drum Burial Area. *Id.*

[7] The Corporate Defendants provide no evidence to support the allegation that Emulsion is the only asphalt company in Seaford, much less within a 200 mile radius.

Defendants imply that EPA interviewed Nero some time prior to confirmation of debtor's reorganization plan; however, EPA had no contact with Nero until after DNREC alerted EPA in late 1996 that EPA might have to clean up the Drum Burial Area. Although EPA had been advised by Mr. Krewatch in 1985, during the last ten days of the Clean Water Act removal action at the Krewatch Farm Site, that an "asphalt plant (from Seaford)" disposed of drums at the Drum Burial Area and that Tony Nero was the "hauler," the efforts of EPA's On-Scene Coordinator ("OSC") to reach Mr. Nero (four days prior to the end of the 1985 removal) failed. *Plaintiff's Summary Judgment Brief*, at 10-11. After that, EPA had no reason to look for Mr. Nero again until after DNREC alerted EPA in late 1996 that EPA might have to finish the cleanup of the Drum Burial Area. EPA had previously concluded, in 1988, that no response action was required there. Thus, it had made no sense then to spend resources searching for parties who might bear responsibility for hazardous substances disposed of in the Drum Burial Area.

The statement quoted above is illogical, obviously, because merely knowing the name of EPC (Emulsion) would not have led to knowledge of Hyer and GAC. Had Mr. Krewatch remembered in 1985 that Emulsion was the local asphalt company and told EPA that, EPA still would have known nothing regarding Hyer and GAC unless it had sent an investigator to Emulsion's premises. Only by visiting Emulsion and interviewing Newlin Buckson could EPA have determined that GAC and Hyer had arranged to dispose of drums at the Drum Burial Area. For the reasons stated above, that would have made no sense at that time. *See Plaintiff's Summary Judgment Brief*, at 14-16.

E. Paragraph 32, *Response*

The Corporate Defendants list certain allegedly undisputed facts in Paragraph 32 of their

Response. There is one glaring factual error in this paragraph, as well as several minor ones.[8] Moreover, subparagraph 32(5) of the Response is misleading because the Corporate Defendants do not include important facts that are a matter of record.

The Corporate Defendants are flatly wrong when they allege that "EPA traced the source of the contamination to an asphalt company in Seaford, Delaware." *Response*, ¶ 32. As stated above, Mr. Krewatch told EPA's OSC, a few days before the OSC finished his work in 1985 and left the Krewatch Farm, that drums in the Drum Burial Area came from an asphalt plant in Seaford. EPA had no reason to trace the source of the drums until it or DNREC investigated whether the Drum Burial Area threatened public health or the environment. EPA and DNREC did investigate the Area in 1987-1988 and EPA concluded, in December, 1988, that the Drum Burial Area did not merit a CERCLA response. EPA learned of the connection between Emulsion and the Site from DNREC in 1996, but only after DNREC had revisited the Site in 1994, found contamination of concern to it under Delaware state law, ordered Emulsion to clean the Site, entered into an agreement with GAC (on behalf of Emulsion) for GAC to clean the Site, and advised EPA: that GAC's cleanup had disclosed a witches brew of hazardous substances; that GAC was abandoning the cleanup; and that EPA likely would have to finish the job. *See Plaintiff's Summary Judgment Brief*, at 18-21.

The Corporate Defendants state in subparagraph 32(5) of their Response that "the EPA was listed by the Debtor as having not one but ten unliquidated claims in the Bankruptcy Case." *Response*,

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[8] At subparagraph 32(1), the Corporate Defendants state that EPA began its investigation at the Drum Burial Area "in the early 1980s." *Response*, subparagraph 32(1). EPA began investigating the Drum Burial Area in July, 1985. *Plaintiff's Summary Judgment Brief*, at 11. At subparagraph 32(6), they refer to an EPA office in Sacramento. EPA has no regional office there.

Subparagraph 32(5). This listing provided EPA with no notice, in any practical sense, of claims it might have against the debtors. It is worth noting that Debtor Gardner Industries, Inc. ("GII") filed a Schedule of Liabilities in the Corporate Debtors' bankruptcy case that was 533 sheets long. *See Motion by Corporate Defendants for Partial Summary Judgment, at Exhibit "B" to Motion.* On pages 256-257, GII listed eight Regional offices of EPA as creditors, including Region III; however, the pages are otherwise totally blank. *Id.* GII provided no information, as requested on the Schedule forms, about the date of the claims, their amounts, and whether the claims were unliquidated, contingent, or disputed. *Id.* GII did not include any claim or reference to contamination at the Krewatch Farm Site. *Id.*

Hyer, GII and their affiliated debtors had facilities in eight EPA Regions. Facilities of debtors or their affiliates were located in, among other places, Houston, Texas (Region VI), Islip, New York (Region II), Seaford, Delaware (Region III), Tampa, Florida, (Region IV), Kansas City, Kansas (Region VII), Long Beach, California (Region IX), Chicago, Illinois (Region V), and Denver, Colorado (Region VIII). *See Second Amended Joint Plan of Reorganization as Modified Submitted by the Gardner Corporate Debtors, Raymond T. Hyer, Jr., and the Official Committee of Unsecured Creditors of the Gardner Corporate Debtors*, at 10, 13, 16, 17, 20, 23, and 26. It appears that the only EPA Regions where there were no facilities owned or operated by debtors or their affiliates were Regions I and X, headquartered in Boston, Massachusetts and Seattle, Washington respectively.

Thus, to the extent that one can conclude anything from the blank pages in the Debtors' Schedules that allude to EPA claims, one should conclude that the "unliquidated claims" that the debtors were referring to were claims for "owner or operator" liability at the debtors' facilities

themselves. There is nothing at all to suggest that claims might have existed as a result of debtors' disposals of hazardous substances at locations the debtors did not own or operate.[9]

IV. REPLY TO ASSERTION THAT EMULSION IS PROTECTED UNDER THE PLAN AND CONFIRMATION ORDER

The Corporate Defendants contend that Emulsion is protected from pre-petition claims "through the injunctive provisions of the Confirmation Order and the applicable provisions of the Plan." *Response*, ¶ 35. They claim that Emulsion is included within the Plan's definition of the "Reorganized Company" and that the Confirmation Order is binding on the Reorganized Company. *Id.*, at ¶ 39. The Corporate Defendants then leap to the assertion that the "Reorganized *Debtors*, including [Emulsion]" are protected under the terms of the Plan and the Confirmation Order from the commencement of claims arising prior to the effective date of the Plan. *Id.* (emphasis supplied). The Corporate Defendants allege, in addition, that EPA had adequate notice of Emulsion's treatment under the Plan because EPA was provided the Plan and the Confirmation Order and the relevant terms of the Plan are straightforward. *Id.*, at 42.

The Corporate Defendants' arguments are unavailing because: the Plan does not protect Emulsion from claims that arose prior to the Plan's effective date; the Corporate Defendants offer no proof that EPA was ever served copies of the Plan and Confirmation Order; and – assuming that the United States is incorrect and Plan does, somehow, protect Emulsion from pre-1993 claims – the provisions of the Plan are hardly straightforward. Indeed, the Plan's treatment of the term upon which

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[9] To the extent that debtors continue to own the sites where they are operating, they remain liable for any pre-petition contamination at those sites. *In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992).

the Corporate Defendants primarily rely, "Reorganized Company," is internally inconsistent.

The Corporate Defendants focus on Section VIII.E of the Plan in their attempt to provide protection to Emulsion. That Paragraph states, however, that "the Reorganized Company shall consist of the service corporation and its wholly owned subsidiaries as set forth below." *Plan*, § VIII.E.1. The Plan requires that the same person be the Chief Financial Officer of "the Reorganized Company, its subsidiaries, and its Reorganized Affiliates, including Sun Coatings, Inc. and Chemex, Inc. *and of Emulsion Products Company*." *Id.* (emphasis supplied). Plainly, under that term of the Plan, Emulsion Products Company is something other than the Reorganized Company, a Reorganized Affiliate, Sun Coatings, Inc. or Chemex, Inc. Nor is Emulsion Products Company a subsidiary of the Reorganized Company's service corporation. These are listed on pages 96-99 of the Plan, and Emulsion is not among them. *Id.*, § VIII.E.2.a - n. Moreover, Emulsion is referred to as a corporation which had "not been specifically treated in this section," but was nevertheless not to be dissolved. *Id.*, § VIII.E.3.

Thus, a critical portion of the Plan upon which the Corporate Defendants rely to argue that Emulsion falls within the ambit of the "Reorganized Company" shows, instead, that Emulsion stands alone. Thus, the term of the Confirmation Order which binds the "Reorganized Company" does not bind Emulsion. Nor is Emulsion among the "Reorganized Debtors."

Plainly, neither the Plan nor the Confirmation Order protect Emulsion against claims which arose prior to the effective date of the Plan. Thus, even if the Court should rule (in error, Plaintiff would contend) that the United States' claim for the recovery of CERCLA costs that EPA began to accrue in late 1996 arose pre-petition, Emulsion has received no discharge, release or other protection under the

Plan against that claim. For all of the reasons set forth in Plaintiff's Summary Judgment Brief, even if the terms of the Plan can be construed in a literal sense to provide protection to Emulsion, those terms are ineffective for that purpose as a matter of law. *See Plaintiff's Summary Judgment Brief*, at 38-40.

WHEREFORE, for the reasons stated above, the Response of the Corporate Defendants to Plaintiff's Motion for Partial Summary Judgment is unavailing and Plaintiff's Motion should be granted.

Respectfully submitted,

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NRTN-BLP § 149:22
6A Norton Bankr. L. & Prac. 2d § 149:22

Norton Bankruptcy Law and Practice 2d
William L. Norton, Jr. [FNa]
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Analysis
Part 19. Related Laws and Issues
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§ 149:22. DISCHARGE

West's Key Number Digest: Bankruptcy ⇦ 3345

A discharge in bankruptcy will most likely, with certain exceptions, release the debtor from liability for environmental damages arising before the bankruptcy petition was filed. [FN95] Section 523 of the Code provides that certain debts survive a debtor's bankruptcy case. [FN96] A majority of the cases dealing with the dischargeability of environmental claims, however, are based on whether such claims constitute "claims" for purposes of the Bankruptcy Code, and not whether § 523 is applicable. For example, monetary claims by governmental agencies for response costs which have been expended prepetition appear to be dischargeable debts; however, the courts are divided as to when claims arise for purposes of CERCLA liability, and therefore whether they are dischargeable. In addition, it is not clear whether cleanup orders in the nature of injunctive relief give rise to a "right to payment" pursuant to the definition of "claim" under the Bankruptcy Code and thus are dischargeable in bankruptcy. [FN97]

There are basically three view of when a claim "arises" for purposes of dischargeability. The pro-creditor, the "response costs" view, states that a CERCLA claim must be established, including the occurrence of response costs, before a dischargeable claim arises. [FN98] This view is a minority view. The pro-debtor view is referred to as the "relationship" view. The "relationship" view was adopted by the Second Circuit in the case of In re Chateaugay Corp. ("LTV"). [FN99] The relationship view (sometimes referred to as the conduct test) appears to be a minority view, but several courts have recently used its rationale. [FN1] The majority view is more intended to be neutral and is referred to as the "fair contemplation" view. The "fair contemplation" view was adopted in the decision of In re National Gypsum Co. [FN2]

United States v. Union Scrap & Metal [FN3] adopted the "response costs" view. In that case, the EPA did not know about the debtor's involvement with a Superfund site until after the debtor's discharge. The EPA argued its claim was not discharged because its claims arose when it incurred response costs. The court agreed. Despite the broad definition of "claim" in the Bankruptcy Code, the court looked to nonbankruptcy law to determine whether the EPA's CERCLA demands constituted a claim for bankruptcy purposes. Under CERCLA, a legal obligation does not arise until response costs have been incurred. The "response costs" view appears to be a minority view. In fact, another Minnesota District Court in an opinion subsequent to *Union Scrap* disregarded the "response cost" rule and focused instead on whether the party asserting the CERCLA claim had notice of its claim. [FN4]

The seminal case on the dischargeability of claims based on environmental damages is Ohio v. Kovacs. [FN5] In *Kovacs*, the Supreme Court held that a debtor's obligations under a state injunction ordering cleanup of a hazardous waste disposal site was a dischargeable debt. The Court emphasized that the state-appointed receiver who took possession of the site to initiate the cleanup had cleaned up the site prior to the bankruptcy petition. With the receiver in control of the site, the cleanup order was converted into an obligation to pay money, and thus was dischargeable in bankruptcy. The Court, however, did not address whether every cleanup injunction that requires an expenditure of money is dischargeable.

A very important opinion on the dischargeability of environmental liability was handed down by the Second Circuit in the *LTV* bankruptcy case. [FN6] In that case, the United States and the State of New York brought actions seeking declaratory judgments as to the dischargeability of (1) CERCLA response costs and (2) RCRA and other environmental injunctive obligations. The EPA filed bankruptcy claims for response costs it had incurred at 14 sites at which the debtor was a potentially responsible party (PRP). All but one of the sites required additional response costs, and the EPA contended that the debtor might also be a PRP at various unidentified sites. The EPA filed an adversary proceeding to determine whether future response costs for the identified and unidentified sites were "claims" under § 101(5) of the Bankruptcy Code. The debtor maintained that because the costs stemmed from prepetition conduct, they were claims and therefore not dischargeable. The District Court agreed with the debtor, holding that postpetition response costs for prepetition releases or threatened releases were dischargeable even if the EPA became aware of the releases after bankruptcy.

In affirming the District Court, the Second Circuit initially reviewed § 101(5)' s definition of "claim". The court reasoned that:

Congress unquestionably expected this definition to have wide scope. By the broadest possible definition... the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.

Although the court recognized that this language might arguably bar the victims of a bridge-collapse from asserting claims that the bridge was constructed before, but collapsed after, the construction company filed for bankruptcy, the court reasoned:

Yet it must be obvious that enormous practical and perhaps constitutional problems would arise from recognition of such a claim. The potential victims are not only unidentified, but there is no way to identify them. Sheer fortuity will determine who will be on one bridge when it crashes. What notice is to be given to these potential "claimants"?

The Second Circuit determined that it did not have to decide whether the definition of "claim" applies to tort victims injured by prepetition conduct, especially in the difficult case of prepetition conduct that is does not result in any harmful consequences to the victim. The court stated that it was confronted only with the far more manageable problem of sums ultimately to be owed to the EPA at such time as it incurs CERCLA response costs.

The Second Circuit viewed the affiliation between the EPA and the debtor as analagous to a contract, rather than a tort relationship. According to the Second Circuit, "unmatured" and "contingent" contract claims are obligations that will become due and payable upon the happening of a future event that was within the actual or presumed contemplation of the parties at the time that the original relationship between the parties was created. The Second Circuit said that although there did not yet exist between the EPA and the debtor the degree of relationship between claimant and debtor typical of an existing though unmatured contract claim, the relationship was far closer than that existing between future tort claimants totally unaware of injury and a tortfeasor. The EPA was acutely aware of the debtor, and vice versa. The relationship between environmental regulating agencies and those subject to regulation was held to provide sufficient "contemplation" of contingencies to bring most ultimately maturing payment obligations based on prepetition conduct within the definition of "claims". Although the EPA did not yet know the full extent of the hazardous waste removal costs, and did not yet even know the location of all sites at which such wastes may yet be found, the location of these sites, the determination of their coverage by CERCLA, and the incurring of response costs by the EPA are all steps that may fairly be viewed, the court said, in the regulatory context, as rendering the EPA's claim "contingent," rather than placing it outside the Code's definition of "claim."

Applying the above rationale, the Second Circuit affirmed the District Court's holding that response costs are dischargeable where they result from prepetition releases or threatened release of hazardous substances.

In In re National Gypsum Co., [FN7] the debtor filed a voluntary petition under Chapter 11, and the United States filed a proof of claim concerning the debtor's prepetition conduct at 7 CERCLA Superfund sites (the "Listed Sites"), and reserved its right to assert that the debtor was liable under CERCLA for its prepetition conduct at 13 other unlisted sites (the "Unlisted Sites"). The District Court withdrew the reference to the Bankruptcy Court because the case raised novel issues regarding the interaction of CERCLA and the Code.

The District Court first considered whether future response costs and future natural resource damage costs at the Listed

Sites were "claims" under the Code and therefore subject to discharge. Relying in principal on In re Chateaugay Corp., [FN8] the court used the bankruptcy concept of contingent claims to bring future CERCLA response and damage costs within the ambit of the Code. The court declined, however, to follow the *Chateaugay* court's deference to the Code's objective of a "fresh start" at the expense of CERCLA's goal of environmental cleanup, and ruled that only future response and natural resource damage costs that can be "fairly contemplated" by the parties at the time of the bankruptcy were claims under the Code.

Second, the court considered whether costs arising from the debtor's prepetition conduct at the Unlisted Sites were dischargeable claims under the Code. Applying the same standard developed in its analysis of the Listed Sites, the court rules that all liability at the Unlisted Sites arising from prepetition conduct which were fairly within the contemplation of the parties constituted dischargeable claims.

The *National Gypsum* case provides an example of what could be considered fair contemplation, including "knowledge by the parties of the site in which a PRP may be liable, a National Priorities List listing, notification by EPA of PRP liability, commencement of investigation and cleanup, and occurrence and response costs." [FN9]

In a case decided shortly after the *LTV* case, [FN10] the Bankruptcy Court for the Eastern District of California was faced with a similar issue as that decided in *LTV*. The Bankruptcy Court held that for purposes of discharge in bankruptcy, a claim arises under California environmental law statutes when costs are incurred. On appeal, the United States Bankruptcy Appellate Panel of the Ninth Circuit reversed, holding that the State of California's claim arose when the hazardous waste was released, not when funds were expended. [FN11]

In that case, the debtors were the sole owners of the shares of a corporation known as Jensen Lumber Company ("JLC"). JLC leased a site on which it operated a lumber mill. Part of JLC's operations involved dipping lumber in a fungicide containing pentachlorophenol ("PCP"). The fungicide was kept stored in a cinder block tank.

JLC ceased operations and filed for bankruptcy under Chapter 11 after its loan from Bank of America became in default and the bank demanded payment. Shortly thereafter, the Jensens filed for bankruptcy as individuals under Chapter 7 of the Bankruptcy Code and were granted a discharge.

Subsequently, the State of California discovered a potential hazardous waste problem involving the fungicide at the site where JLC had conducted its operations. Almost three years after the Jensens were granted their discharge, the state notified the Jensens that they were considered PRPs and would possibly be held personally liable for the cleanup costs. A year later, the state assessed the Jensens a portion of the cleanup costs. The Jensens moved to reopen their Chapter 7 case to seek a determination that the costs of the cleanup of the site arose out of their prepetition conduct, and that they were therefore discharged of the cleanup costs.

The Bankruptcy Court held that the debtor's liability for the cleanup costs arose was when the State of California expended funds to cleanup the site and not when the toxic material was released. The lower court stated that it found it hard to accept the conclusion that a CERCLA claim arises upon the release or threatened release of hazardous waste. Section 101(5) of the Code defines "claim" as a "right to payment." The lower court did not understand how a CERCLA claim arises when the EPA has not yet earned the right to payment by incurring costs in cleaning up the toxic waste. The mere act of spilling toxic waste may give rise to other types of damage claims, such as personal injury or property damage, not to mention possible criminal penalties, but it does not cause a CERCLA claim to arise. The lower court held that only when the DHS (the California environmental agency) uses the State Superfund to remedy the contamination does it receive a right to payment under California's Hazardous Substance Account Act.

The lower court also noted that its finding that a claim arising under CERCLA or state environmental law arises when funds are expended is in the best interest of the public policy of protecting and preserving the environment, and would not offend the bankruptcy policy of providing debtors a fresh start.

The Bankruptcy Appellate Panel of the Ninth Circuit disagreed with this rationale. The appellate court stated that a determination that a claim under environmental laws arises when funds are expended contravenes the overriding goal of the Bankruptcy Code to provide a fresh start for the debtor. The appellate court went on to hold that a theory that a bankruptcy claim arises based on the debtor's conduct, and therefore at the time of a release, most closely reflects

legislative intent and finds the most support in the case law. Ultimately, the appellate panel followed the reasoning set forth in the *Johns-Manville* case, [FN12] as applied in the *LTV* case, [FN13] to hold that the State of California's claim was discharged in the debtor's bankruptcy case because claims in bankruptcy arise based on the debtor's conduct, and therefore the State of California's claim arose when the hazardous materials were released.

The Ninth Circuit recited a summary of the conflicting case law on the issue of when a claim arises. The Ninth Circuit was obviously persuaded by the *National Gypsum* decision and adopted what appeared to be the "fair contemplation" test. The court noted that an inspector from the California Water Board visited the property during the bankruptcy proceeding and therefore knew of the serious environmental hazard that existed at the site. The court imputed one State of California agency's knowledge to another and concluded that the state had sufficient knowledge of Jensen's potential liability to give rise to a contingent claim for clean up before the Jensen's filed their individual bankruptcy petition. As a result, the state claim against the Jensens was discharged in the Jensens' bankruptcy.

In another case regarding the dischargeability of response claims incurred by the Government pursuant to CERCLA, the *Union Scrap* case, [FN14] the United States sought to recover approximately $1.2 million for response costs incurred at a site in Minneapolis, Minnesota (referred to as "the Washington Ave. Site") from approximately 70 various parties, including an entity known as Taracorp Industries, Inc. ("Taracorp"). Taracorp filed a motion for summary judgment on the basis that the Government's claims had been discharged in its earlier bankruptcy case.

In 1978, Union Scrap Iron & Metal ("Union Scrap") and Taracorp entered into an agreement pursuant to which Union Scrap would extract lead plates from car batteries for Taracorp. Taracorp would then melt the lead plates down at its St. Louis Park, Minnesota site (the "St. Louis Park Site"). Before being melted down, the plates were stored at Union Scrap's Washington Ave. Site along with partially broken battery casings.

In October, 1982, Taracorp filed for relief pursuant to Chapter 11 of the Bankruptcy Code. A bar date of July 5, 1983 was set and a plan of reorganization was later confirmed in July, 1985.

In October, 1983, the Minnesota Pollution Control Agency (MPCA) began an investigation of the Washington Ave. Site. The MPCA recommended that the site be placed on the EPA's National Priorities List. The EPA then conducted a site assessment which led to stabilization work from November, 1985 to January, 1986. In October, 1987, the State of Minnesota, using EPA Superfund monies, performed an investigation which resulted in the EPA conducting an emergency removal action.

During Taracorp's bankruptcy case, the EPA did participate in negotiations regarding liabilities at two of Taracorp's smelting facilities. The EPA did not, however, file a claim. Taracorp's confirmed plan provided that the claim of any governmental unit, or other entity, that (1) was not filed with the court on or before July 5, 1983 and (2) was not scheduled, or was scheduled as contingent, "shall be, and hereby is, disallowed, discharged and forever barred."

Taracorp therefore argued that it was discharged of its CERCLA liabilities to the United States. The EPA, however, contended that its CERCLA claims were not discharged, because the liabilities arose from Union Scrap's Washington Ave. Site and were not discussed in Taracorp's disclosure statement. Therefore, the EPA could not have known of its potential claim against Taracorp during its bankruptcy. In addition, the CERCLA claims arose only after the plan had been confirmed, because liability for cleanup response costs arises only when the EPA actually incurs those expenses. Taracorp, however, contended that the EPA's causes of action for response costs was discharged because they fell within the definition of "claim" pursuant to the Bankruptcy Code, since the release or threatened release of the hazardous substances at the Washington Ave. Site occurred prepetition.

The court held that Taracorp was not discharged of the CERCLA liabilities in connection with the Washington Ave. Site, because the cleanup costs were not actually incurred by the EPA until after the confirmation of Taracorp's plan. The court based its holding on the rationale that a claim exists only when the prebankruptcy relationship between the debtor and the third party contained all of the elements necessary to give rise to a legal obligation under the relevant substantive nonbankruptcy law. Therefore, because the EPA had not incurred any response costs at the time Taracorp's plan was confirmed, the EPA could not have had a claim in Taracorp's bankruptcy case, since there was no legal obligation under CERCLA.

The court rejected Taracorp's assertion that the EPA had a contingent claim and stated that the debtor's legal duty to pay does not come into existence until it is triggered by the occurrence of a future event which was within the actual or presumed contemplation of the parties at the time that the original relationship of the parties was created. Therefore, the court reasoned that because neither Taracorp nor the EPA had any knowledge of a CERCLA claim, the CERCLA liability for the Washington Ave. Site was not a contingent claim subject to discharge in Taracorp's bankruptcy case.

The court next distinguished the instant case from the *LTV* case on the basis that the *LTV* court allowed the governmental agencies the opportunity to file their claims before confirmation of LTV's plan. In the case at bar, however, Taracorp sought a determination that the EPA's claims were discharged in a bankruptcy which ended over five years hence, but the EPA was never given the chance to file a claim because it had no knowledge of the Washington Ave. Site CERCLA claims. The court, therefore, refused to apply the rationale of the *LTV* case.

The court then supported its holding based on the policies underlying CERCLA. The court stated that Congress intended for the EPA (1) to be able to respond promptly and effectively to problems arising from the disposal of hazardous waste, and (2) to hold those responsible parties liable for the cost of remediating the harmful conditions. The court stated that if it adopted Taracorp's view, the EPA would be required to seek preenforcement CERCLA litigation by forcing the EPA to conduct an investigation of potential CERCLA claims every time a PRP filed for bankruptcy. The court stated that this would divert the EPA's resources away from cleaning up sites. In support of its opinion, the court embraced the reasoning of the Bankruptcy Court in the *Jensen* case, [FN15] which held that it would be too burdensome for the EPA to file a proof of claim in every bankruptcy case in which the debtor was conceivably a PRP. The court concluded that the mere release of a hazardous substance prior to the confirmation of a bankruptcy reorganization plan does not give rise to a CERCLA claim which is discharged by that confirmation. The court, therefore, denied Taracorp's motion to dismiss, because Taracorp failed to show that that the EPA held a contingent claim based on preconfirmation contacts between the various parties. It should be noted that in connection with its review of *Jensen*, the Bankruptcy Appellate Panel of the Ninth Circuit dismissed the reasoning of the court in *Union Scrap*, stating that the *Union Scrap* court employed an unwarranted interpretation of the definition of "claim" under the Bankruptcy Code.

In the *National Gypsum* case, [FN16] the debtor filed a voluntary petition under Chapter 11, and the United States filed a proof of claim concerning the debtor's prepetition conduct at seven 7 CERCLA Superfund Sites ("the Listed Sites"), and reserved its right to assert that the Debtor was liable under CERCLA for its prepetition conduct at 13 other unlisted sites ("the Unlisted Sites"). The District Court withdrew the reference to the Bankruptcy Court because the case raised novel issues regarding the interaction of CERCLA and the Bankruptcy Code.

The District Court first considered whether future response costs and future natural resource damage costs at the Listed Sites were "claims" under the Code and therefore subject to discharge. Relying principally on the *Chateaugay* case, [FN17] the court used the bankruptcy concept of contingent claims to bring future CERCLA response and damage costs within the ambit of the Code. The court declined, however, to follow the Chateaugay court's deference to the Code's objective of a "fresh start" at the expense of CERCLA's goal of environmental cleanup, and ruled that only future response and natural resource damages costs that can be "fairly contemplated" by the parties at the time of the bankruptcy are claims under the Code.

Second, the court considered whether costs arising from the debtor's prepetition conduct at the Unlisted Sites were dischargeable claims under the Code. Because this issue was raised by the debtor's motion for summary judgment on a Declaratory Judgment Act claim, the court first determined that it had jurisdiction to decide the claim because the United States waived its sovereign immunity by appearing in the bankruptcy action and because 42 USC § 9613(h) is not a jurisdictional bar to declaratory relief in a bankruptcy proceeding when the Government has filed a proof of claim. Applying the same standard developed in its analysis of the Listed Sites, the court ruled that all liability at the Unlisted Sites arising from prepetition conduct which was fairly within the contemplation of the parties constituted dischargeable claims.

The debtor objected to the Government's attempt to amend its proof of claim to add costs arising from the Unlisted Sites. Applying Bankruptcy Rule 9006(b) as construed in a case decided by the U.S. District Court for the Northern District of Texas, [FN18] the court found that the novel nature of the legal issues presented by the case constituted unique and extraordinary circumstances excusing a creditor's failure to file by the bar date. Accordingly, the court granted the Government an extension of time within which to file a proof of claim relating to the Unlisted Sites.

One case [FN19] stands for the proposition that a claimant's prepetition knowledge of potential environmental problems is evidence that the claimant "fairly contemplated" prepetition releases and that as a result the prepetition releases constituted prepetition claims which were discharged in bankruptcy. That case also states that a Bankruptcy Court's approval of a trustee's assumption of an unexpired lease carries with it the implicit finding that there are no uncured environmental obligations under the terms of the lease.

The site in question was a piece of property located in Florida ("the Site"). In 1962, Lone Star Building Centers, Inc. ("Lone Star") purchased the Site. Between 1962 and 1979, as part of its Florida wholesale and retail lumber and building materials supply company, Lone Star used the Site as a distribution, warehouse, and operation center. Lindsley Stores, Inc. ("Lindsley"), also a retail lumber and building supply business, was lessee of the Site beginning in 1979.

In 1985, during its term as lessee of the Site, Lindsley filed for Chapter 11 bankruptcy. Lindsley retained control of the lease following its bankruptcy discharge in 1986. The lease remained in Lindsley's possession until 1989 when it was assigned to NCL Corp. ("NCL"), the plaintiff in the action.

NCL sued the owner and lessor of the Site, Lone Star, for the cost it had incurred and would continue to incur in cleaning up the Site. Lone Star filed an answer and a seven-count counterclaim seeking injunctive, compensatory, and contributory relief on account of Lindsley and NCL's pre and postbankruptcy activities. Lone Star, like NCL, also sought cleanup costs.

NCL moved to dismiss the counterclaims, arguing that they were based on prepetition conduct and therefore were discharged in Lindsley's bankruptcy. Lone Star countered that NCL was responsible (1) as an "owner" and "operator" of the Site under CERCLA, [FN20] and (2) because the bankruptcy trustee assumed Lindsley's leases to the Site and assigned them to NCL.

To resolve the issues, the District Court first engaged in a comparison of the *LTV* decision, [FN21] with the *National Gypsum* decision. [FN22] The court noted that the *LTV* decision held that the regulatory relationship between the debtor and the EPA provided "sufficient contemplation" to warrant discharging claims based on prepetition releases. In *National Gypsum,* however, the court required that the claims actually be "fairly contemplated by the parties." The *NCL* court found that Lone Star had prepetition knowledge of the Site's potential environmental problems; therefore, under either the LTV or the National Gypsum standard, Lone Star and Lindsley fairly contemplated prepetition releases, and these prepetition releases constituted prepetition claims which were discharged in Lindsley's bankruptcy.

Next, Lone Star argued that Lindsley, when it assumed the lease, did not make any payment to Lone Star for violating lease provisions concerning environmental regulations. Lone Star argued that as a result, when Lindsley assumed the lease, it assumed all the defaults which it did not otherwise cure and passed liability for those defaults to NCL. The court disagreed and stated that neither the language of Code § 365(b) nor the cases cited by Lone Star supported a position that unsecured prepetition defaults become "assumed" postpetition obligations. Rather, the court ruled, § 365(b)'s clear import is that the trustee must cure all defaults before assuming the contract rights or obligations. The court further noted that before the Bankruptcy Court orders the trustee to assume the lease, it must determine that the trustee has satisfied the requirements of § 365. Thus, the court reasoned, when the Bankruptcy Court approved an assumption of the lease, it necessarily found that there were no uncured defaults existing.

In conclusion, the court held that because Lone Star's claim should have been raised in Lindsley's bankruptcy, and because the Bankruptcy Court necessarily found that all defaults were cured and the lease was assumed "free and clear," Lone Star's claim based on prepetition defaults were barred by res judicata. Lone Star's counterclaims were dismissed in part, to the extent they sought relief on prepetition releases or threatened releases, or Lindsley's prepetition conduct.

In a recent case, [FN23] the Seventh Circuit decided that actual response costs are not necessary for a CERCLA claim to have accrued for bankruptcy purposes. It is only necessary for the claimant to know that a release of a hazardous substance has occurred and that at least some CERCLA response costs are imminent. The Seventh Circuit also found that notice by publication was adequate to discharge a state agency's claim for environmental cleanup assessments.

Chicago, Milwaukee, St. Paul & Pacific Railroad Co. ("Milwaukee Road") filed for bankruptcy in 1977 under the Bankruptcy Act of 1898. In 1979, one of Milwaukee Road's trains carrying copper ore derailed; that led to

contamination and the need for cleanup on certain property in Washington State ("the Site"). Despite the fact that the Washington State Department of Transportation ("WSDOT") was informed that the train derailment had resulted in a contamination problem, neither WSDOT nor the State of Washington filed a proof of claim with the Bankruptcy Court before the December 26, 1985 bar date for all preconsummation claims.

The issue in the case was whether WSDOT or the State of Washington had a preconsummation claim or contingent claim that should have been raised before the December 26, 1985 bar date. The court first noted that what constitutes a claim or contingent claim often varies depending on the posture of the case. The court discussed that in tort cases where the victim discovers its injuries before the close of the case, courts have held that the claim arose for purposes of bankruptcy at the earliest point possible -- the point at which the tortious act occurred. The court next discussed that in cases where a tort victim who was the subject of a prepetition tortious act incurs an injury which surfaces after the bankruptcy case, a court is less likely to conclude that the party had a claim or contingent claim dischargeable in the bankruptcy.

The court next discussed that the facts of this case were similar to the *Jensen* and *LTV* decisions, where the creditors knew they had potential CERCLA claims before the close of the bankruptcy case. The court disagreed with the *Union Scrap* case that a party must incur response costs before it has a CERCLA claim. The court noted that the same *Union Scrap* court appears to have backtracked from that requirement because in a later decision, also involving a creditor who was not aware of the debtor's relationship to a known hazardous site until after the close of bankruptcy, the *Union Scrap* court shifted its emphasis from whether the creditor incurred a response cost to whether the creditor had knowledge of its claim before the close of bankruptcy. [FN24]

The court concluded that when a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which the potential claimant knows will lead to CERCLA response costs and has conducted tests with regard to the contamination problem, the potential claimant has a contingent CERCLA claim.

In the case at bar, the WSDOT clearly knew prior to the December, 1985 bar date that there had been a release of a hazardous substance on the Site and that this hazardous release would fall within the purview of CERCLA. The court held that WSDOT's claim was discharged in bankruptcy and that the WSDOT was precluded from bringing its action.

WSDOT argued that its claim should not be discharged because it had no notice of the Milwaukee bankruptcy case. The court found that notice of the bankruptcy by publication in such publications as The Wall Street Journal constituted adequate notice to discharge WSDOT's claim.

Chicago, Milwaukee, St. Paul & Pacific Railroad's bankruptcy has spawned another discharge question. [FN25] The Milwaukee Railroad sold a rail yard to the Union Pacific Railroad. The Union Pacific Railroad subsequently became liable for or incurred cleanup costs at the property under various statutes. The court adopted the view that CERCLA claims were barred because Union Pacific knew of the release of the hazardous substances that caused the response costs as a contingent claim that was barred by the discharge. However, Washington State enacted new environmental liability statutes several years after the discharge. The court found that the claims under the new statutes were not similar claims to claims under the old statutes that were already barred by discharge. Therefore, the court held that claims based on a statute enacted after the discharge date are not barred. Union Pacific Railroad then could assert a claim for contribution which did not exist prior to discharge against the debtor post-discharge.

A case decided by the U.S. District Court for the Northern District of Illinois [FN26] follows *National Gypsum* and holds that a claim under CERCLA arises when the release of hazardous substances occurs, and that such a claim may be discharged in bankruptcy if both parties "fairly contemplated" that such a claim might arise.

AM International, Inc. ("AMI") manufactured Blankrola, a solvent for the cleaning of duplicating machines, from 1959 to 1981 in a plant in Iowa ("the Site"). In 1981, DBS Inc. ("DBS") acquired the Site. AMI expressly warranted to DBS that the Site was free and clear of any and all claims and was in compliance with all laws and regulations. In April, 1982, AMI filed for Chapter 11 bankruptcy. Its plan was confirmed in 1984. DBS never raised concerns in the bankruptcy case about environmental problems.

In 1986, the stock of DBS was purchased by DataCard Corp. ("DataCard"). DataCard discovered contamination at the

Site while conducting a due diligence investigation. DataCard send a notice to AMI that it had incurred response costs associated with the contamination of the Site. The notice commenced the statutorily required 60-day notice to AMI of DataCard's intent to bring a civil action pursuant to CERCLA. AMI immediately thereafter filed suit against DataCard. In a motion for summary judgment, AMI alleged, among other things, that it was discharged from any debt arising before September, 1984 when its plan was confirmed.

On the issue of whether the environmental claims arose before confirmation of AMI's plan, the court first discussed the conflicting case law. Although the court agreed with much of the reasoning in the *LTV* decision, the court stated that some interpretations of the decision taken to its logical conclusion may give too broad a meaning to the word "claim." Instead, the court chose to follow the *National Gypsum* decision, which tempers the breadth of the definition of "claim" which may discharged. The court held that a "contingent claim" arises when the release of hazardous substances occurs and that such a claim may be discharged in bankruptcy if both parties "fairly contemplated" that such a claim might arise. The issue of whether the parties "fairly contemplated" that future response costs might be incurred was a genuine issue of material fact and therefore required that AMI's motion for summary judgment be denied.

Note that several recent cases have held that confirmation of the debtor's plan did not discharge any subsequent CERCLA liability arising from prepetition hazardous waste disposal activities, where CERCLA was not yet enacted and therefore liability did not exist until after the plan was confirmed. [FN27]

In one case, [FN28] the Seventh Circuit found that the United States' failure to file a proof of claim under CERCLA in the debtor's reorganization extinguished the liability of the debtor's successor in its capacity as the operator or manager of a hazardous waste site; nevertheless, the court ordered that the debtor's successor was liable under CERCLA based on its capacity as the current owner of the hazardous waste site. The court reasoned that liability of the debtor's successor under CERCLA was a claim that runs with the land and survived the debtor's bankruptcy. [FN29]

The Third Circuit has now gone a step farther. [FN30] The debtor had preiously conducted manufacturing operations at the contaminated site. However, the debtor had moved from the site almost four years before filing for bankruptcy, because its lease had expired. The court held that the state's claim had not been discharged and that the state had the right to require the debtor to clean up the site.

The court reasoned that the waste continued to leak. Therefore, under the New Jersey environmental statute, the court determined the debtor was a generator of waste and had a continuing responsibility for the waste it disposed. This continuing responsibility could not be discharged. The court then found the debtor had had a corresponding duty to comply with the environmental laws including cleaning up the contaminated site, which the state could require by an injunction. The Third Circuit stated that the debtor's obligations ran with the waste, regardless of where it might be, and the state's injunctive power to require the debtor to clean up the waste was not dischargeable. [FN31]

However, at least one District Court has declined to follow *Torwico*. [FN32] The court found that the debtor's rejection of a prepetition lease caused prepetition clean up costs to be dischargeable claims. The court used abandonment analysis to determine that the lease rejection was an effective abandonment of the property. Abandonment was proper in this situation, because no imminent harm to public health or safety, particularly with no evidence of postpetition discharges was found. Because the property was no longer property of the estate, any clean-up costs could not benefit the estate, so the court found the postpetition cleanup costs could not be administrative expenses. The court found that because the actions occurred prepetition, the clean up costs were unsecured dischargeable claims relating to the prepetition actions of the debtor.

According to the court in another case, [FN33] environmental liability cannot be discharged if the affected claimholder is not given some notice of the bankruptcy proceeding andthe likelihood of discharge. In that case, the debtor argued that the confirmation of the debtor's plan of reorganization in 1984 discharged all claims for environmental liability that might arise from pollution the debtor had caused on its real estate before confirmation of its plan. At the time the debtor filed its bankruptcy petition, the debtor was aware that environmental agencies were pursuing an environmental problem on the debtor's property. However, the debtor was not aware at that time of the identity of successor titleholders to the property. Nevertheless, the court held that the debtor was aware of contingent liability to successor titleholders in general for the environmental problems that it created, and therefore should have listed that class of creditors (that is, successor titleholders) as having contingent or unliquidated claims. As a result, the court denied the debtor's summary judgment

motion to dismiss a successor titleholder's CERCLA claims.

In In re Texaco, Inc., the court similarly held that the debtor, Texaco, was not relieved of its future cleanup obligations. [FN33.5] During its reorganization in 1987, Texaco had put a series of motions and proposed orders before the bankruptcy court regarding the assumption of its oil and gas leases. The implication of the motions and orders was that Texaco wished to assume all of its oil and gas leases. Upon assumption, the debtor would, therefore, become liable not only for the cure amount of any pre-assumption defaults, but also for all obligations arising after the assumption of the contracts. In April 1997, LaFourche Basin Levee District and West Jefferson Levee District (collectively, the "Levee Districts") brought a complaint in Louisiana state court seeking cancellation of mineral leases with Texaco with respect to four oil and gas leases alleging, among other things, that Texaco had failed to act as a reasonably prudent operator with regard to its obligations with respect to environmental cleanup, remediation, and restoration. In July 1998, Texaco filed its motion in the bankruptcy court seeking an order barring the Levee Districts' claims on the grounds that the claims should have been filed in Texaco's Chapter 11 case and, not having been so filed, were discharged by the confirmation order. Texaco's allegations were based upon an order entered by the bankruptcy court in 1987, and obtained by Texaco ex parte, stating that some of Texaco's oil and gas leases -- including those belonging to the Levee Districts, Texaco argued -- were not subject to § 365 because they were, under the relevant state laws, conveyances of real property and not true leases. Therefore, Texaco argued, the Levee Districts' claims for cleanup costs were discharged upon confirmation. The court, however, found that these claims were not discharged upon confirmation because the order regarding the applicability of § 365 was not obtained with the intent of obtaining a discharge of postpetition obligations, and Texaco did not disclose that goal. Rather, the court opined, the record was clear that neither Texaco nor its oil and gas lessors contemplated that the order would result in the lessors having to file hundreds of millions of dollars of possible future claims for cost of cleanup remediation, restoration, well plugging, and abandonment that may arise years in the future. Texaco had made repeated representations that it would continue to operate its oil and gas agreements in the ordinary course of business and that it did not wish to incur in its bankruptcy case the termination costs associated with rejection of oil and gas leases. Furthermore, earlier in Texaco's bankruptcy case, the Louisiana District Court had previously determined that other Louisiana oil and gas leases were executory contracts and, therefore, fully assumable. The court, therefore, denied summary judgment to Texaco, refusing to enforce the bankruptcy court's 1987 order in a way unimagined by the parties at the time of the entry of the order and contrary to a final order of the Louisiana District Court on the same issue.

In addition to a debtor's inability to obtain a discharge if a potential creditor is not given appropriate notice, a debtor may be unable to discharge an environmental debt if the debtor is able to clean up the site by personal performance, rather than expenditure of funds. For example, in one case, [FN34] the debtor owned the equipment which allowed personal performance. The court held that the debtor was not discharged on its cleanup obligation to the extent compliance did not require the expenditure of money. In contrast to this case, the facts in *Kovacs* established that the debtor was disabled by a receivership from personally taking charge of and carrying out the cleanup. [FN35]

One District Court case has also held that, as distinguished from*Kovacs,* obligations arising from cleanup orders which do not seek monetary payments are not dischargeable obligations, because they do not fit into the Bankruptcy Code's definition of "claims." [FN36] In that case, two individuals, Hubler and Taylor, operated a surface coal mine as a partnership. The Secretary of the Interior (the "SOI"), discovered a violation at the mine site and issued an order requiring the partnership to remediate the area. The order was not complied with, and Hubler and Taylor each filed for bankruptcy. Each was later granted a discharge of their prepetition obligations. The United States subsequently filed an injunction action seeking an order compelling Hubler and Taylor to comply with their obligations to remediate the mining site. The court held that because the United States was not seeking a payment from the defendants, but was instead seeking to compel the defendant's to comply with a cessation order, the defendant's obligations were not dischargeable. The court held that a cleanup order does not constitute a right to a money payment just because the enjoined parties would be forced to expend money to comply with their cleanup obligations.

The Eleventh Circuit has recently implemented a new test to determine when future product liability tort claims are claims that are dischargeable and eligible for distribution. This test may have applications in determining when environmental contamination creates a claim and if it is dischargeable. [FN37] The Eleventh Circuit labeled the new test the Piper test. The Piper test is a combination of the relationship and conduct tests. The Piper test has two elements (i) did events occurring before confirmation create a relationship, such as contact, exposure, impact, or privity, between the claimant and the debtor's product (i.e., hazardous substances) and (ii) the basis for liability is the debtor's prepetition

conduct in designing, manufacturing and selling the allegedly defective product.

To determine if a claim exists, the Eleventh Circuit held that the debtor's prepetition conduct gives rise to a prepetition claim only if there is a relationship between an identifiable claimant or group of claimants and that prepetition conduct. [FN38] Although the Eleventh Circuit was grappling with future product liability tort claimants and not environmental claims, it would appear that the Piper test would be applicable in some situations to determine when enironmental claims arose to determine if the claim was discharged.

In an action to recover contribution for a disposal facility cleanup, plaintiffs brought a complaint to recover expenses from, among others, a purchaser of a debtor, Clark Oil & Refining Corporation ("Old Clark"). [FN39] Old Clark sold property free and clear to Apex Oil Company pursuant to § 363(f). Apex Oil Company later changed its name to Clark Refining & Marketing, Inc. ("New Clark"). The plaintiffs sought to hold New Clark liable for the response costs. New Clark contended that it purchased the assets free and clear of any encumbrances, including environmental claims.

The District Court denied New Clark's request for dismissal or summary judgment based on the sale free and clear of encumbrances. The court held that successor liability was applicable to CERCLA claims and any successor liability was not discharged by Old Clark's bankruptcy. The court denied the motion, because questions of fact existed as to whether New Clark was a continuity of Old Clark's business enterprise theory of successor liability.

The court held that a sale free and clear in a bankruptcy context did not preclude the contribution claims. The court reasoned that only claims dischargeable in the bankruptcy case could be avoided by a sale free and clear pursuant to § 363(f). If the claim would have been discharged in Old Clark's bankruptcy case, then the claim would not attach to the property sold free and clear. However, if the claim could not have been discharged, then the claim could be asserted against the purchaser. The District Court then adopted the Seventh Circuit test for determining when a claim arose. The District Court denied the motion to dismiss, because facts were missing to determine when the claim arose.

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[FN95]. 11 USC §§ 727, 1141, 1328.

[FN96]. See Norton Bankruptcy Law and Practice 2d, § 149:23, infra.

[FN97]. In re Torwico Electronics, Inc., 8 F.3d 146, 24 Bankr. Ct. Dec. (CRR) 1394, 30 Collier Bankr. Cas. 2d (MB) 86, 37 Env't. Rep. Cas. (BNA) 1809, Bankr. L. Rep. (CCH) ¶ 75487, 24 Envtl. L. Rep. 20016 (3d Cir. 1993) (state's injunction to require the debtor to cleanup previously leased property no longer in debtor's possession was not a discharged or dischargeable claim).

[FN98]. See U.S. v. Union Scrap Iron & Metal, 123 B.R. 831, 832, 32 Env't. Rep. Cas. (BNA) 2103 (D. Minn. 1990).

[FN99]. In re Chateaugay Corp., 944 F.2d 997, 22 Bankr. Ct. Dec. (CRR) 74, 25 Collier Bankr. Cas. 2d (MB) 620, 34 Env't. Rep. Cas. (BNA) 1233, 21 Envtl. L. Rep. 21466 (2d Cir. 1991).

[FN1]. See In re Hanna, 168 B.R. 386, 39 Env't. Rep. Cas. (BNA) 1260, Bankr. L. Rep. (CCH) ¶ 76001 (Bankr. 9th Cir. 1994); In re Texaco Inc., 182 B.R. 937 (Bankr. S.D.N.Y. 1995).

[FN2]. In re National Gypsum Co., 139 B.R. 397, 27 Collier Bankr. Cas. 2d (MB) 199, 34 Env't. Rep. Cas. (BNA) 1577, 22 Envtl. L. Rep. 20783 (N.D. Tex. 1992).

[FN3]. U.S. v. Union Scrap Iron & Metal, 123 B.R. 831, 32 Env't. Rep. Cas. (BNA) 2103 (D. Minn. 1990).

[FN4]. See Sylvester Bros. Development Co. v. Burlington Northern R.R., 133 B.R. 648, 653, 34 Env't. Rep. Cas. (BNA) 1365, 22 Envtl. L. Rep. 20596 (D. Minn. 1991).

[FN5]. Ohio v. Kovacs, 469 U.S. 274, 105 S. Ct. 705, 83 L. Ed. 2d 649, 12 Bankr. Ct. Dec. (CRR) 541, 11 Collier Bankr. Cas. 2d (MB) 1067, 21 Env't. Rep. Cas. (BNA) 2169, Bankr. L. Rep. (CCH) ¶ 70163, 15 Envtl. L. Rep. 20121 (1985).

[FN6]. In re Chateaugay Corp., 944 F.2d 997, 22 Bankr. Ct. Dec. (CRR) 74, 25 Collier Bankr. Cas. 2d (MB) 620, 34 Env't. Rep. Cas. (BNA) 1233, 21 Envtl. L. Rep. 21466 (2d Cir. 1991).

[FN7]. In re National Gypsum Co., 139 B.R. 397, 27 Collier Bankr. Cas. 2d (MB) 199, 34 Env't. Rep. Cas. (BNA) 1577, 22 Envtl. L. Rep. 20783 (N.D. Tex. 1992).

[FN8]. In re Chateaugay Corp., 944 F.2d 997, 22 Bankr. Ct. Dec. (CRR) 74, 25 Collier Bankr. Cas. 2d (MB) 620, 34 Env't. Rep. Cas. (BNA) 1233, 21 Envtl. L. Rep. 21466 (2d Cir. 1991).

[FN9]. 139 B.R. at 408. See also In re Jensen, 995 F.2d 925, 24 Bankr. Ct. Dec. (CRR) 621, 29 Collier Bankr. Cas. 2d (MB) 101, 36 Env't. Rep. Cas. (BNA) 1954, Bankr. L. Rep. (CCH) ¶ 75323, 23 Envtl. L. Rep. 20991 (9th Cir. 1993) (state had sufficient knowledge of debtor's potential liability to give rise to a contingent claim before debtor's bankruptcy); NCL Corp. v. Lone Star Bldg. Centers (Eastern) Inc., 144 B.R. 170, 23 Bankr. Ct. Dec. (CRR) 575, 35 Env't. Rep. Cas. (BNA) 1812 (S.D. Fla. 1992) (a claimant's prepetition knowledge of potential environmental problems is evidence that the claimant "fairly contemplated" prepetition releases and that as a result these prepetition releases constituted prepetition claims which were discharged in bankruptcy); Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co., 974 F.2d 775, 23 Bankr. Ct. Dec. (CRR) 559, 35 Env't. Rep. Cas. (BNA) 1377, Bankr. L. Rep. (CCH) ¶ 74794, 23 Envtl. L. Rep. 20009 (7th Cir. 1992) (actual response costs are not necessary for a CERCLA claim to have accrued for bankruptcy purposes, only that the claimant know that a release of a hazardous substance has occurred and that at least some CERCLA response costs are imminent); AM Intern., Inc. v. Datacard Corp., 146 B.R. 391, 35 Env't. Rep. Cas. (BNA) 1985, Bankr. L. Rep. (CCH) ¶ 1236 (N.D. Ill. 1992) (a claim under CERCLA arises when the release of hazardous substances occurs, and that such a claim may be discharged in bankruptcy if both parties "fairly contemplated" that such a claim may arise).

[FN10]. In re Jensen, 114 B.R. 700, 20 Bankr. Ct. Dec. (CRR) 899, Bankr. L. Rep. (CCH) ¶ 73410 (Bankr. E.D. Cal. 1990), decision rev'd, 127 B.R. 27, 21 Bankr. Ct. Dec. (CRR) 1183, 25 Collier Bankr. Cas. 2d (MB) 214, 33 Env't. Rep. Cas. (BNA) 1597, Bankr. L. Rep. (CCH) ¶ 73995 (Bankr. 9th Cir. 1991), aff'd, 995 F.2d 925, 24 Bankr. Ct. Dec. (CRR) 621, 29 Collier Bankr. Cas. 2d (MB) 101, 36 Env't. Rep. Cas. (BNA) 1954, Bankr. L. Rep. (CCH) ¶ 75323, 23 Envtl. L. Rep. 20991 (9th Cir. 1993), followed by In re Hanna, 168 B.R. 386, 39 Env't. Rep. Cas. (BNA) 1260, Bankr. L. Rep. (CCH) ¶ 76001 (Bankr. 9th Cir. 1994).

[FN11]. In re Jensen, 127 B.R.27, 21 Bankr. Ct. Dec. (CRR) 1183, 25 Collier Bankr. Cas. 2d (MB) 214, 33 Env't. Rep. Cas. (BNA) 1597, Bankr. L. Rep. (CCH) ¶ 73995 (Bankr. 9th Cir. 1991), aff'd, 995 F.2d 925, 24 Bankr. Ct. Dec. (CRR) 621, 29 Collier Bankr. Cas. 2d (MB) 101, 36 Env't. Rep. Cas. (BNA) 1954, Bankr. L. Rep. (CCH) ¶ 75323, 23 Envtl.

L. Rep. 20991 (9th Cir. 1993).

[FN12]. In re Johns-Manville Corp., 57 B.R. 680, 14 Collier Bankr. Cas. 2d (MB) 273, Bankr. L. Rep. (CCH) ¶ 70998 (Bankr. S.D.N.Y. 1986).

[FN13]. In re Chateaugay Corp., 944 F.2d 997, 22 Bankr. Ct. Dec. (CRR) 74, 25 Collier Bankr. Cas. 2d (MB) 620, 34 Env't. Rep. Cas. (BNA) 1233, 21 Envtl. L. Rep. 21466 (2d Cir. 1991).

[FN14]. U.S. v. Union Scrap Iron & Metal, 123 B.R. 831, 32 Env't. Rep. Cas. (BNA) 2103 (D. Minn. 1990).

[FN15]. In re Jensen, 114 B.R. 700, 20 Bankr. Ct. Dec. (CRR) 899, Bankr. L. Rep. (CCH) ¶ 73410 (Bankr. E.D. Cal. 1990), decision rev'd, 127 B.R. 27, 21 Bankr. Ct. Dec. (CRR) 1183, 25 Collier Bankr. Cas. 2d (MB) 214, 33 Env't. Rep. Cas. (BNA) 1597, Bankr. L. Rep. (CCH) ¶ 73995 (Bankr. 9th Cir. 1991), aff'd, 995 F.2d 925, 24 Bankr. Ct. Dec. (CRR) 621, 29 Collier Bankr. Cas. 2d (MB) 101, 36 Env't. Rep. Cas. (BNA) 1954, Bankr. L. Rep. (CCH) ¶ 75323, 23 Envtl. L. Rep. 20991 (9th Cir. 1993).

[FN16]. In re National Gypsum Co., 139 B.R. 397, 27 Collier Bankr. Cas. 2d (MB) 199, 34 Env't. Rep. Cas. (BNA) 1577, 22 Envtl. L. Rep. 20783 (N.D. Tex. 1992).

[FN17]. In re Chateaugay Corp., 944 F.2d 997, 22 Bankr. Ct. Dec. (CRR) 74, 25 Collier Bankr. Cas. 2d (MB) 620, 34 Env't. Rep. Cas. (BNA) 1233, 21 Envtl. L. Rep. 21466 (2d Cir. 1991).

[FN18]. Mackie v. Production Oil Co., 100 B.R. 826 (N.D. Tex. 1988).

[FN19]. NCL Corp. v. Lone Star Bldg. Centers (Eastern) Inc., 144 B.R. 170, 23 Bankr. Ct. Dec. (CRR) 575, 35 Env't. Rep. Cas. (BNA) 1812 (S.D. Fla. 1992).

[FN20]. See 42 USC § 9607(a), discussed in Norton Bankruptcy Law and Practice 2d, § 149:3, supra.

[FN21]. In re Chateaugay Corp., 944 F.2d 997, 22 Bankr. Ct. Dec. (CRR) 74, 25 Collier Bankr. Cas. 2d (MB) 620, 34 Env't. Rep. Cas. (BNA) 1233, 21 Envtl. L. Rep. 21466 (2d Cir. 1991).

[FN22]. In re National Gypsum Co., 139 B.R. 397, 27 Collier Bankr. Cas. 2d (MB) 199, 34 Env't. Rep. Cas. (BNA) 1577, 22 Envtl. L. Rep. 20783 (N.D. Tex. 1992).

[FN23]. Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co., 974 F.2d 775, 23 Bankr. Ct. Dec. (CRR) 559, 35 Env't. Rep. Cas. (BNA) 1377, Bankr. L. Rep. (CCH) ¶ 74794, 23 Envtl. L. Rep. 20009 (7th Cir. 1992).

[FN24]. Sylvester Bros. Development Co. v. Burlington Northern R.R., 133 B.R. 648, 34 Env't. Rep. Cas. (BNA) 1365, 22 Envtl. L. Rep. 20596 (D. Minn. 1991).

[FN25]. Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co., 78 F.3d 285, 42 Env't. Rep. Cas. (BNA) 1097, 26 Envtl. L. Rep. 20700 (7th Cir. 1996), cert. denied, 117 S. Ct. 763, 136 L. Ed. 2d 710 (U.S. 1997).

[FN26]. AM Intern., Inc. v. Datacard Corp., 146 B.R. 391, 35 Env't. Rep. Cas. (BNA) 1985, Bankr. L. Rep. (CCH) ¶ 1236 (N.D. Ill. 1992).

[FN27]. See Matter of Penn Cent. Transp. Co., 944 F.2d 164, 22 Bankr. Ct. Dec. (CRR) 154, 33 Env't. Rep. Cas. (BNA) 1819, 22 Envtl. L. Rep. 20011 (3d Cir. 1991); U.S. v. Serafini, 135 B.R. 219, 22 Bankr. Ct. Dec. (CRR) 726, 34 Env't. Rep. Cas. (BNA) 1318 (M.D. Pa. 1991); In re Duplan Corp., 209 B.R. 324, 30 Bankr. Ct. Dec. (CRR) 1187, 45 Env't. Rep. Cas. (BNA) 1262 (Bankr. S.D.N.Y. 1997); but see Matter of Reading Co., 115 F.3d 1111, 30 Bankr. Ct. Dec. (CRR) 1244, 44 Env't. Rep. Cas. (BNA) 1865, 27 Envtl. L. Rep. 21075 (3d Cir. 1997) (A successor could only bring its claim against debtor. The debtor was not discharged because the claim accrued post-discharge. Because the United States' CERCLA claim was discharged, the successor's claim failed as a matter of law since the successor's common liability with the debtor and the United States no longer existed).

[FN28]. Matter of CMC Heartland Partners, 966 F.2d 1143, 23 Bankr. Ct. Dec. (CRR) 206, 35 Env't. Rep. Cas. (BNA) 1001, Bankr. L. Rep. (CCH) ¶ 74739, 22 Envtl. L. Rep. 21313 (7th Cir. 1992).

[FN29]. Matter of CMC Heartland Partners, 966 F.2d 1143, 23 Bankr. Ct. Dec. (CRR) 206, 35 Env't. Rep. Cas. (BNA) 1001, Bankr. L. Rep. (CCH) ¶ 74739, 22 Envtl. L. Rep. 21313 (7th Cir. 1992), citing 42 USC § 9607(a)(1) and Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 35 Env't. Rep. Cas. (BNA) 1005, 22 Envtl. L. Rep. 20936, 122 A.L.R. Fed. 743 (4th Cir. 1992).

[FN30]. In re Torwico Electronics, Inc., 8 F.3d 146, 24 Bankr. Ct. Dec. (CRR) 1394, 30 Collier Bankr. Cas. 2d (MB) 86, 37 Env't. Rep. Cas. (BNA) 1809, Bankr. L. Rep. (CCH) ¶ 75487, 24 Envtl. L. Rep. 20016 (3d Cir. 1993).

[FN31]. In re Torwico Electronics, Inc., 8 F.3d 146, 24 Bankr. Ct. Dec. (CRR) 1394, 30 Collier Bankr. Cas. 2d (MB) 86, 37 Env't. Rep. Cas. (BNA) 1809, Bankr. L. Rep. (CCH) ¶ 75487, 24 Envtl. L. Rep. 20016 (3d Cir. 1993). See also AM Intern., Inc. v. Datacard Corp., 106 F.3d 1342, 1348, 30 Bankr. Ct. Dec. (CRR) 434, 44 Env't. Rep. Cas. (BNA) 1001, Bankr. L. Rep. (CCH) ¶ 77260, 27 Envtl. L. Rep. 20503 (7th Cir. 1997) (Seventh Circuit accepted *Torwico* view that where a cleanup order could not be converted into a monetary obligation, such orders are not dischargeable in bankruptcy; and In re Industrial Salvage, Inc., 196 B.R. 784, 29 Bankr. Ct. Dec. (CRR) 218, 43 Env't. Rep. Cas. (BNA) 1243 (Bankr. S.D. Ill. 1996) (closure order did not constitute dischargeable order; in any event, the debtor proposed to retain the property and had to comply with the environmental laws as the current owner of the property).

[FN32]. In re McCrory Corp., 188 B.R. 763, 28 Bankr. Ct. Dec. (CRR) 216, 41 Env't. Rep. Cas. (BNA) 2042, Bankr. L. Rep. (CCH) ¶ 76827 (Bankr. S.D.N.Y. 1995).

[FN33]. Waterville Industries, Inc. v. First Hartford Corp., 124 B.R. 411, 32 Env't. Rep. Cas. (BNA) 1925 (D. Me. 1991).

[FN33.5]. In re Texaco Inc., 254 B.R. 536 (Bankr. S.D.N.Y. 2000).

[FN34]. U.S. v. Whizco, Inc., 841 F.2d 147, 17 Bankr. Ct. Dec. (CRR) 497, 27 Env't. Rep. Cas. (BNA) 1373, Bankr. L. Rep. (CCH) ¶ 72214, 18 Envtl. L. Rep. 20571 (6th Cir. 1988).

[FN35]. Ohio v. Kovacs, 469 U.S. 274, 105 S. Ct. 705, 83 L. Ed. 2d 649, 12 Bankr. Ct. Dec. (CRR) 541, 11 Collier Bankr. Cas. 2d (MB) 1067, 21 Env't. Rep. Cas. (BNA) 2169, Bankr. L. Rep. (CCH) ¶ 70163, 15 Envtl. L. Rep. 20121 (1985).

[FN36]. U.S. v. Hubler, 117 B.R. 160 (W.D. Pa. 1990), judgment aff'd, 928 F.2d 1131 (3d Cir. 1991).

[FN37]. Epstein v. Official Committee of Unsecured Creditors of Estate of Piper Aircraft Corp., 58 F.3d 1573, 27 Bankr. Ct. Dec. (CRR) 694, 33 Collier Bankr. Cas. 2d (MB) 1751, Bankr. L. Rep. (CCH) ¶ 76574 (11th Cir. 1995).

[FN38]. Epstein v. Official Committee of Unsecured Creditors of Estate of Piper Aircraft Corp., 58 F.3d 1573, 27 Bankr. Ct. Dec. (CRR) 694, 33 Collier Bankr. Cas. 2d (MB) 1751, Bankr. L. Rep. (CCH) ¶ 76574 (11th Cir. 1995).

[FN39]. Ninth Ave. Remedial Group v. Allis-Chalmers Corp., 195 B.R. 716 (N.D. Ind. 1996).

NRTN-BLP § 149:22
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ORIGINAL

CERTIFICATE OF SERVICE AND COMPLIANCE WITH LOCAL RULE 9073-1(D)

I HEREBY CERTIFY that a true copy of the foregoing Plaintiff's Reply to Response of Corporate Defendants to Plaintiff's Motion for Partial Summary Judgment was served on all parties listed below this 16th day of August, 2002, via first class mail.

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